

GOVERNMENT BY JUDGES

ADDRESS

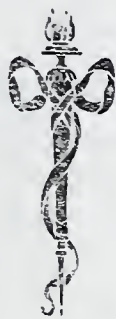
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By

HON. WALTER CLARK

CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA



PRESENTED BY MR. OVERMAN

MARCH 24, 1914.—Referred to the Committee on Printing

REPORTED BY MR. CHILTON.

IN THE SENATE OF THE UNITED STATES,
October 21, 1914.

Resolved, That the manuscript submitted by Mr. Overman on March 25, 1914, entitled "Government by Judges," an address delivered by Chief Justice Walter Clark, of the North Carolina Supreme Court, at Cooper Union, New York City, January 27, 1914, be printed as a Senate document.

Attest:

JAMES M. BAKER, *Secretary.*

GOVERNMENT BY JUDGES.

Address by Chief Justice WALTER CLARK, of the Supreme Court of North Carolina, delivered at Cooper Union, New York City, January 27, 1914.

MY FELLOW CITIZENS: It has been said that a contented people have no annals. The present unrest among the people, not only in this country but the world around, strange as it may seem to some, is one of the best signs of the times. When people at large are content, they are either ignorant of better conditions or hopeless of attaining them. A "divine discontent" is the basis of civilization, and of all progress in bettering the condition of humanity.

Some one has said that "civilization is hell to the under dog!" Those who create the wealth of the world do not possess it, for they pass through the world with the barest living, and not always that, while those who do not create it have all of it except the mere subsistence of those who create it and of the other workers. We are fond of saying that this country is a "government of the people, by the people, and for the people"; that our Government rests upon the consent of the governed; that all power is derived from the people and is to be exercised for their benefit and in accordance with their will. This is the end toward which the world is moving. We shall some day realize that ideal, but it will be "far on in summers that we shall not see," for as yet we are merely "on our way."

All advance toward better conditions has been through a ceaseless combat between those who exploit and those who are exploited; between those who create the wealth of a country and those who take as large a share of it as they can grasp.

In this country, as in all countries, the control of the Government is in the hands of the few. Our institutions merely give an easier opportunity to the many whenever they have the will and the intelligence to improve their conditions. We have learned that the form of government amounts to very little. The real question is, Where does the control of that government reside?

In the countries of the Old World power was vested in an hereditary sovereign in whose selection the people had no voice and who needed no approval of his conduct, however arbitrary. In the process of time the wealthier classes were able to force recognition, and they became the nobility and hereditary legislators. When, in course of time, after long struggles and many revolutions, the class next below obtained recognition, they elected the lower house, as in England, but upon a suffrage restricted to the well-to-do and by a system which permitted the influence and the money of the government of the king and nobility to dictate the election of a majority of the lower house or their purchase by the bestowal of titles and money.

To this system as buttresses there was an army and navy whose best posts were filled by younger members of the nobility, while the

rank and file were composed of men from the exploited masses, conscripted or forced into service, and paid an insignificant amount, ranging from 2 to 20 cents per month. The Church was also a State institution, likewise paid for by the exploited millions, and whose higher positions were filled by the appointment of the younger members of the aristocracy.

Such, in brief, was the origin and the development of governments in the Old World. If there was discontent, the army and navy under the command of their aristocratic officers were used to shoot down the friends and relatives of the underpaid rank and file. And the thunders of the Church were used to frighten with threats of eternal condemnation and everlasting fires those who aspired to better their conditions in life and obtain some little larger share of the wealth they created. Those who objected to being exploited were shot in this world and officially damned in the next. Our plutocrats, lacking these facilities, have resorted to the infallibility of the Supreme Court.

In this country, in 1776, we issued a Declaration which was the sublimest that the world had ever heard. It proclaimed the rights of mankind and their equality and freedom. For seven years the people of this country sacrificed themselves to obtain a government based upon the principles of that great Declaration of Human Rights. And then, when the struggle was over, with sublime audacity, the reactionary party—the champions of government of the many by the few—quietly, unostentatiously, but effectively, took control of the Government.

In 1787 there was assembled at Philadelphia a convention for the nominal purpose of creating better business and commercial relations between the States. A stronger Union was necessary. Taking advantage of this need, the reactionary element shaped the Constitution of the United States.

That instrument deserves an analysis. Our Government is divided into three great departments—the legislative, the executive, and the judicial. Of these three great departments which compose our whole scheme of Government, the control of only one-sixth, i. e., the election of the lower branch of the legislative department—the House of Representatives—was given to the people. Indeed, it was less than one-sixth, because the House of Representatives not having the confirmation of public officials or the treaty power and other privileges which were given to the Senate, is considerably less than one-half of the legislative department. Besides, the election of the Members of the House of Representatives was not granted to the people, as we now understand the word, for in no State was there “manhood suffrage,” but the right of voting was in most, if not in all, restricted by a property qualification, which in some States meant the ownership of land.

The other and the far larger part of the legislative department—the Senate—was chosen at second hand by legislators, themselves chosen originally by a restricted suffrage. It was soon discovered that the election of Senators was largely controlled by the great financial interests. Exceedingly few of them were ever frankly in sympathy with the masses. They were not in accord with the “under dog,” to whom they were not indebted for their seats and to show sympathy for whom would be a sure means of defeating a reelection. This was soon understood, and as far back as 1820, now more than

90 years ago, an effort was made to amend the Constitution to require the election of Senators and judges by the people. But so powerful has been the influence of the great corporations and the allied vested interests that it took 90 years for the people to win the right to choose the Senators who should represent them. The fight was not won until less than a year ago. The astonishing change in the tone of the Senate has already vindicated the wisdom of the people in persistently demanding this great change.

But to return to the Constitution of the United States as adopted in 1787. There was the provision for the election of the President. This was not given to the people, and it was intended that he should be elected at third hand by electors chosen by the legislatures of the different States, the legislatures being chosen, as already stated, by restricted suffrage. This system, however, has not worked out as intended. The people demanded that the electors should be chosen by themselves. This was done gradually as State after State made this change. After nearly 40 years the system of the legislatures electing the presidential electors was entirely done away with, except in South Carolina. In 1876 Colorado chose its presidential electors by the legislature, and it is still in the power of any State legislature to change the election of its presidential electors back to that method—if they dare to do it. As a result, however, the greatest constitutional amendment was adopted by popular action, without writing any amendment into the Constitution, for the people captured the right to elect the President by making the electors mere figureheads, and have ever since chosen their President by popular vote. Though each elector has the legal power still to cast his vote for his individual choice, no one has yet dared even in the most heated contest, as in the Hayes-Tilden election, to vote for a candidate other than the one for whom he was pledged to vote.

Now, let us turn to the third department of the Government, which in the beginning was considered of so little influence in the Government that Chief Justice Jay of the Supreme Court of the United States resigned to take the position of governor of New York, and the appointment to the Supreme Court was declined by more than one when tendered. The possibilities of the court were not understood, and indeed were unknown until its vast extension of power was grasped, without any grant in the Constitution itself, by an obiter dictum opinion in *Marbury v. Madison*. Those who drafted the Constitution at Philadelphia had been careful to place the judges beyond any influence of public opinion by making them appointive, at fourth hand, by the President, who was to be chosen at third hand, subject to confirmation by a Senate chosen at second hand, and they were to hold for life, so as to be free from any consideration whether their conduct was conformable to the will of the people, which last, with well-framed irony, was proclaimed as the "foundation stone" of the new Republic.

Nothing could be more absolutely out of accord with a republic than the appointment of officials for life. At the time, however, that this Constitution was adopted such was the tenure of judges in all the States but one, and in none of them were the judges chosen by the people, even under the restricted suffrage then obtaining. But it was soon discovered that the method of selecting judges meant practically their selection by the property interests, and that a life tenure ab-

stracted them from all responsibility. As a result, State after State amended its constitution, until to-day the judges are elective in all the States but seven; and while they still retain the life tenure nominally in four States, they practically have that tenure in only one. For in the other three the judges can be dropped at any time by a majority vote of the legislature, without trial and without cause assigned.

The change from life tenure to a term of years and to election by the people was in effect the adoption of a modified recall, the necessity for which had been proven by experience. Not that the judges, either elective or appointive, either State or Federal, have been corrupt. To the credit of the bench it must be said that such instances have been exceedingly rare. But experience has demonstrated the absolute unwisdom of placing irreviewable power in the hands of any man or set of men by life tenure, no matter how wise or pure they may be. It had proved so in the past as to kings, though there had been some good kings, and it proved equally so as to life judges, for State after State abolished it. As to the United States judges, though bill after bill has been introduced into Congress to change their life tenure into tenure for a term of years, and their method of appointment into election by the people of the respective districts and circuits over which they preside, the influence of the great vested interests has postponed the adoption of the proposed measure.

The importance, indeed the overwhelming preponderance, of the judiciary in the Government was unexpectedly created in 1803 by a decision of the Supreme Court of the United States, without a line in the Constitution to authorize it, when that body assumed the right to nullify and veto any act of Congress that they chose to hold unconstitutional. This astonishing declaration was made in the case known as *Marbury v. Madison*, by Chief Justice Marshall. The doctrine was shrewdly set forth in an obiter dictum—that is, in an opinion which did not call for an execution of any mandate of the court—for he knew that Thomas Jefferson, then President, would not recognize the validity of the opinion nor put it into execution. He therefore laid down the doctrine that the court could, if it chose, declare that any act of Congress was unconstitutional, but wound up by deciding, notwithstanding, against the plaintiff, upon the ground that the Supreme Court was not authorized to issue a mandamus or writ to effectuate the views he had expressed. A few years later, in the matter of the Yazoo claims, when the court, through the same chief justice, held an act unconstitutional and directed the issuance of a writ in accordance with the opinion, Andrew Jackson, then President, pithily said: "John Marshall has made his decision; has he? Now let us see him execute it." It was accordingly never executed, and to this day has remained a blank piece of paper.

The assertion of this doctrine was promptly seized upon as a boon by the special interests and by all who at heart believed in the government of the many for the benefit of the few. It has practically made the courts the dominant power in every State and in the Union. Whenever any progressive statute has not been in accord with the economic views entertained by the courts, it has always been in their power, which has been very generally exercised, to declare that the statute in question was unconstitutional because it was not "due process of law," or "deprives of the equal protection of the law," and there

are other phrases which the judges use at will. Even *Magna Carta*, which was a treaty between King John on the one hand and 13 barons and 13 bishops on the other, in an attempt to restrict the absolute power of an irresponsible king, has sometimes been resorted to as being in some inconceivable way a heaven-born bar in the hands of the courts upon the power of the American people. The phrases above quoted are very elastic and mean just whatever the court passing upon the statute thinks most effective for its destruction. This, of course, makes of vital importance the inquiry, "What are the beliefs of the majority of the court on economic questions, and what happens to be their opinion of a sound public policy?" A power so great and so irreviewable, and therefore so irresponsible, has become the mainstay of the anti-progressive element.

The elastic and much extended phrase, "due process of law," historically and as a legal concept, relates only to procedure. It merely requires that the party shall have right to a regular trial according to ordinary procedure. In the Ives case (201 N. Y., 271) the court set aside an act providing for the compensation of workmen employed in eight inherently dangerous trades. This decision required an amendment to the State Constitution to overrule it. This is but one instance out of hundreds.

It is because of this intrusion of the economic views of the judges that the more recent State constitutions resemble rather a consolidated edition of the statutes than a declaration of the organic law and a frame of government. The judges have made it absolutely necessary that amendments to the Constitution may be made more easily in order to prevent the evil that is caused by their opposition to all progressive measures for the betterment of the public.

Prof. Corwin, of Princeton University, recently said that—

Due process of law is not a legal concept at all, but merely a roving commission to judges to sink whatever legislative craft may appear to them, from the standpoint of vested interests, to be of a piratical tendency.

Dean Trickett well said:

The legislators are elected to speak, and usually do speak, the people's will. The people will never be masters in their own house so long as a majority of nine gentlemen, pretending to have Marconigrams from the defunct men of 1787 and 1788 concerning their meaning when they adopted this or that phrase of the Constitution, arrogate to themselves the power of veto, and not merely refuse to aid in the enforcement of statutes, but even launch prohibition against the carrying out of these statutes by those who, unhindered by them, would legally execute them.

The fourteenth amendment, which was passed for the protection of the negro, has been construed as useless as to him, but it has become a tower of safety to the vested interests, who, seeing that suffrage was becoming more and more unrestricted, and that the President had been made elective practically by the people, and that they could not rely, as in Europe, upon an army officered by their sons, or the fulminations of a state church, were thrown back upon the Senate, chosen largely by their influence, and the appointment of judges for life, mostly from the ranks of attorneys who had been their employees.

The vested interests for 90 years held back the election of United States Senators by the people. Their remaining sheet anchor now is the selection of judges appointed by the Executive to hold for life. No one will accuse these judges of corruption, notwithstanding a

few alleged instances and a few impeachment trials. But the fact remains that the appointments to the Federal judgeships are very often made at the instance of influences which are exerted for great interests who feel the need of men in that position who believe in the sacredness of their vested rights. These appointees, as a rule, have been men of ability, but men who, because of their ability, have been retained in the service of great corporations. When these men who have spent their professional life in advocating the decision of causes from the standpoint of their employers are translated to the bench, they naturally continue to view such questions from the same standpoint. This is not corruption on their part, for the more honest their convictions the more tenaciously they will assert those ultra views in their opinions on the bench. The complaint is not of corruption, but of usurpation of control over the lawmaking power, which, under the Constitution, should be in the people. In England, when the people have put a measure through Parliament over the power of the aristocracy, there is an end, for there is neither executive nor judicial veto. Here the interests resort first to the executive and then to the judges to defeat the popular will.

A well-known book gives the secret history of the Dartmouth College case and the methods by which the original views of the court in that case were changed in favor of the vested interests. The true inside history of the methods used to change the court in the income tax case might shock the Nation, if generally made known.

It would be well to inquire just here what authority there is in the Constitution for the assertion of such remarkable power, by which five lawyers sitting in Washington can negative an act of Congress passed by the House and Senate, and approved by the President, and overruling the precedents of the court on which they sit, and overruling, besides, the views of four judges on the same bench, as happened in the income tax case.

There is not a line in the Constitution which authorizes the assumption of this unlimited power by the court. Nor is there a line in any State constitution which so authorizes it. The members of the legislatures and of Congress, governors and presidents, are equally with the judges sworn to observe the Constitution. There is no intimation that to the judges was given the power to negative the exercise of their sworn duties by these other officials, and the presumption was that all equally would obey the Constitution. There was no preeminence given the judges. When Congress, or a legislature, passes a statute, it is a construction by the majority of those bodies that it is constitutional. When the President or the governor vetoes or approves it, the presumption is that he has acted according to his construction of the Constitution; but as the presumption is that the greater number of men are better informed than one, by the constitutions of the States (and the Federal Constitution) in which the veto power is given, there is power lodged in the legislature or Congress to overrule a veto, by a vote ranging from a bare majority to a two-thirds vote. If the executive, or the legislative departments disregard their oaths, the remedy is correction by the people at the next election. If the judges make a mistake in vetoing a statute, there is no power to correct them, especially if holding for life. Had the Constitution given the judges the power to set aside

a statute, it would have given the legislature the same power as in case of the executive to overrule their veto. Had it been supposed that such power for the judges was concealed in the Constitution, it is safe to say that it would not have been ratified by a single State.

This power when assumed by the judges in *Marbury v. Madison* was without a precedent in any other country. It had never been dreamed of before in any other country that the judges would assume governmental functions and negative the action of the men who were intrusted with the lawmaking duties. It had been attempted only once in England, and then they very promptly hung the chief justice (Tressilian) and exiled his associates. And the feat was never attempted again by any subsequent judges. Indeed, in England for a long time the judges were removable at the will of the King, and when that was abandoned they were made removable by a majority vote of Parliament without trial and without cause shown. This is the law in England to this day. If the judges had attempted any such decision as our court made in *Marbury v. Madison*, in the *Dartmouth College* case, or in the *Income Tax* case, and similar cases, the lawmaking power would have at once vindicated its rights by the prompt removal of the judges.

Neither was the power granted to the United States judges by the convention at Philadelphia in 1787. The reactionary element which was in charge of that convention was not inadvertent to the great advantage of an irreviewable body having power to negative the will of the people. They attempted to get into the Constitution a provision to that effect. When that convention met, to protect themselves from any influence from public opinion and in defiance of the maxim that government should exist only by the consent of the governed, it sat with closed doors. The members were sworn not to make copies of any resolution or other action or to correspond with constituents or communicate with others as to any matters pending before the convention. Any record of yeas and nays was forbidden; but fortunately one was kept without the knowledge of the convention. The journal was kept secret, and the motion to destroy it fortunately failed by one majority. Mr. Madison's copy was published only after the lapse of 49 years, when every member had passed beyond human accountability. Only 12 States were ever represented, and one of these withdrew before the final result was reached. Of its 65 members, only 55 ever attended, and so far from being unanimous, only 39 signed the Constitution, and some actively opposed its ratification by their own States. In several States ratification was had by the barest majority. In New York, I believe, a majority of one for ratification was had by persuading a member of the legislature to absent himself. Its ratification by the required number of States was secured only by a pledge to adopt the first 10 amendments which guaranteed the rights of man, a subject which had been wholly omitted. In no State was there any ratification by a vote of the people.

Even in such a convention, thus composed and thus secluded from the influence of public opinion, the persistent effort to grant the judges such power was repeatedly and overwhelmingly denied. The proposition was made, as we now know, from Mr. Madison's journal, that "the judges should pass upon the constitutionality of acts of Congress." This was defeated June 4, receiving the votes of

only two States. It was renewed no less than three times, i. e., on June 6, July 21, and finally again, for the fourth time, on August 15, it was brought forward, and though it had the powerful support of James Madison, afterwards President Madison, and James Wilson, afterwards a justice of the United States Supreme Court, the proposition at no time received the votes of more than three States. On this last occasion, August 15, Mr. Mercer thus summed up the thought of the convention, as evidenced by its vote:

He disapproved of the doctrine that the judges, as expositors of the Constitution, should have authority to declare a law void. He thought the laws ought to be well and cautiously made, and then to be incontrovertible.

Though the doctrine that a court could set aside a statute and deny the authority of the lawmaking power was not recognized in England or any other country, shortly before the convention met the courts of four States, either because averse of power or because they thought themselves a substitute for the authority which before the Revolution had been exercised by the privy council in England of refusing approval to the statutes of our Provinces, had asserted such authority. In Rhode Island the offending judges, who were elected annually by the legislature, were dropped, and the doctrine in other States met with disapproval. These decisions were recent, and Madison and Wilson knew, as the convention did, that they were endeavoring to confer the same power on the Federal Supreme Court, and though it was persistently presented by them on four several occasions, it was thus overwhelmingly defeated.

While friends of this doctrine of judicial supremacy over the other departments of the Government have ingeniously argued in divers ways that the doctrine can be construed into the Constitution, these votes are conclusive that the convention refused to put it there. It is not reasonable to suppose that when the convention gave the President the veto power, but expressly provided that he could be overruled by two-thirds vote in Congress, that they would have given by implication a greater veto to the judges without expressly so stating and without making their action reviewable, as in the case of the presidential veto.

However plausible the arguments in favor of judicial supremacy, its friends can not point to a line in the Constitution which confers it. The only words that can even be construed as giving them any power is the provision that "the Constitution of the United States and the laws made in pursuance thereof shall be supreme." That does not authorize the court to hold any act of Congress unconstitutional, but it means that when a State statute or constitution conflicts with the Federal Constitution and statutes enacted by Congress under its authority, the latter shall govern, just as a later act controls an older one.

Even in *Marbury v. Madison*, Judge Marshall did not claim that any express provision of the Constitution conferred this power, but derived it by implication. Indeed, freed from the prepossessions derived from our long acquiescence in the doctrine, nothing could be more preposterous than the proposition that five lawyers can in their discretion set aside the will of the people as expressed in an act by the Senate and House and approved by the President, and that when this is done the hundred millions of the American people are powerless in any way to review such decision.

If I were speaking to a body of lawyers, I could name case after case in which this has happened, and point out the bar upon progress and upon the amelioration of the conditions of the masses which has resulted therefrom. If I were to quote to you the comments made by Thomas Jefferson upon some of these decisions, the remarks of Andrew Jackson, of Abraham Lincoln, and of others upon the exercise of this usurped power, it would make your ears burn.

Governor Baldwin, formerly chief justice of Connecticut, and a staunch defender of high prerogative in the courts, recently admitted that—

This right of a court to set itself up against the legislature * * * is something which no other country in the world would tolerate.

Mr. Justice Harlan has well said:

When the American people come to the conclusion that the judiciary of this land is usurping to itself the functions of the legislative department of the Government and by judicial construction only is declaring what should be the public policy of the United States, we will find trouble. Ninety millions of people—all sorts of people—are not going to submit to the usurpation by the judiciary of the functions of other departments of the Government, and the power on its part to declare what is the public policy of the United States.

I need not now refer to the case of *Chisholm v. Georgia*, in which the court haled a sovereign State, like a private individual, to the bar, and an indignant people promptly prevented the recurrence of such a spectacle by enacting the eleventh amendment, as to which the court as late as 1890, in *Hans v. Louisiana*, 134 U. S., 11, said: "This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court." This has happened since in the reversal of the income tax decision by the sixteenth amendment. I will not refer to the *Dred Scott* decision, which was so roundly denounced, but which has since been cured by the thirteenth, fourteenth, and fifteenth amendments. I will cite only two cases.

The people of New York, through their legislature, felt aggrieved that the bakers in their State were subjected by the greed of their employers to enormous heat for an excessive number of hours, to the shortening of their lives, and passed a statute limiting such labor to 10 hours per day. The act was promptly attacked by that interest, supported by the influence of other vested interests which feared similar legislation. But the State Court of Appeals, elected by your own people, in *Lochner's* case, affirmed the power of your State to make such regulations. Those great interests at once took the case by appeal to the United States Supreme Court at Washington. It was purely a matter of police regulation, and the Federal court had no jurisdiction over the matter. But they usurped it by the flexible terms of the Fourteenth amendment, which mean anything and everything that the judges see fit, and which can be used to destroy any legislation that they do not approve, and then five judges, the majority of the court, though the four ablest judges dissented, proceeded to tell the bakers that they must work as long as their employers should require, and in ovens as hot as they chose to heat them. With sardonic irony they added that they did this because the bakers had a "right to contract." *Lochner v. N. Y.*, 198 U. S., 45. This was adding insult to injury, for every one knew that the

decision was not in the interest of the bakers, whom the legislature was trying to protect, but in the interest of the employers, who did not wish to be controlled by the public in their greed.

It would have been a revelation to the men who passed the Fourteenth amendment to protect the negro to find it construed as holding white men in slavery by prohibiting legislatures from limiting the hours of labor or forbidding insanitary and dangerous conditions.

Mr. Justice Holmes, who was one of the four dissenting judges in the *Lochner* case, in *Bank v. Haskell*, 219 U. S., 111, speaking for the court, thus finely defines the police power which is reserved to the States: "The police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or the strong and preponderant opinion to be greatly and immediately necessary to the public welfare." This power belongs to the States, and it was judicial usurpation when the United States Supreme Court overruled your State statute.

Then there was the income tax case. This tax had been held legal by the court for 100 years. Under it, during the war, hundreds of millions of dollars had been collected to aid in saving the Union. After long insistence by the people, that great wealth was escaping its due share of taxation, while labor and men of modest means bore nearly the entire burden of supporting the Government, a new income tax was enacted, in spite of the influence of a powerful lobby and of a large part of the press, which ridiculed, after being duly inspired, an income tax. In England one-third of the support of the Government was derived in this way from the superfluities of the wealthy by the levy of a graduated income tax and a graduated inheritance tax, increasing the per cent with the size of the income. The same system was in force in all other countries, as it had been in ours. The bill passed the lower house of Congress unanimously, and I believe there were only one or two votes against it in the Senate. The President, who was a good lawyer, approved it. The plutocracy of the country was opposed. The matter was brought before the Supreme Court of the United States. That court at first affirmed the validity of the act in accordance with all the precedents. Suddenly, one judge changed his views. Information was imparted upon which a rehearing was asked and then by a vote of five to four the act was held unconstitutional and set aside, to the amazement of the whole country and of all foreign nations. By what means this changeable judge received wireless information as to the views of the 39 dead men who signed the Constitution of 1787 has never been known. Certainly he had no respect for the opinions of the preceding judges on that bench who had held otherwise, nor of his four dissenting brethren, nor for his own opinion as expressed on the previous hearing. The result was that the vote of that one man put the Congress and the President into the absurd, not to say wicked, attitude of having passed a law in violation of their oaths to support the Constitution. He also showed a most profound contempt for the 80,000,000 of people who then constituted the United States, but a great regard for the interests and views of the two or three hundred thousand owners of great wealth. The result was that by his vote he transferred over \$100,000,000 of annual taxation from the very rich, who were the most able to pay it, and placed this burden upon the masses, who already paid more than their share of the burdens of

government. His change of mind has thus up to date caused the masses to pay probably three thousand million dollars, which under the will of the people as expressed by the vote of Congress and the approval of the President should have been placed upon those most able to pay it.

The power, thus construed to be in a court, or indeed in the hands of one man, to accomplish such an act as this without any review or possibility of review and without any words in the Constitution conferring it, is so exorbitant and unprecedented that it needs no argument to demonstrate that it ought not to be tolerated, and can not safely be permitted to continue. Not the Czar of Russia, nor any other potentate, would have dared to perpetrate such an act.

It may be interesting to note the origin of the doctrine of judicial supremacy over the lawmaking power as it originated in *Marbury v. Madison*, in 1803, 16 years after the formation of the Constitution. The South was aware that the greater increase in population at the North would give that section control over the House. For the protection of its slave property by the Senate it kept up the process of always simultaneously admitting one slave State and one free State till this could be no longer continued. The South also secured the election of a southern President or of a "northern man with southern principles," up to the election of Lincoln. Its last defense was the power which Marshall had assumed for the court, to set aside acts of Congress. The longer use of such power was jeopardized in 1861 by the election of Lincoln, who had denounced the *Dred Scott* decision, and by the old age of Taney, who died, indeed, in 1864. Thus for 63 years from 1801 to 1864 two southern Chief Justices, Marshall and Taney, together with associates of their way of thinking, held to the theory that legislation by Congress hostile to property rights and slavery could be vetoed by the court.

It is thus singular that this doctrine which was largely a precaution for the protection of property in slaves, and the fourteenth amendment which was passed for the opposite purpose of protecting the negro, have both become the refuge and safeguard of the interests. Neither now subserve their original purpose.

This doctrine is based upon the idea that though a majority of the Senators who are sworn to serve the Constitution may either viciously or ignorantly violate the Constitution in the passage of an act, and though a majority of the House may do the same, and though the President may also either viciously or negligently violate his oath of office by failing to veto an unconstitutional act, and a minority of the court itself may do the same, the five men who constitute the majority are infallible and will never do so, not even when they reverse their predecessors, or, as in the *Income Tax* case, their own court.

Marshall was a great judge and rendered many valuable decisions. But as a matter of history we know that he had strong bias and, like other men, some faults. He was Secretary of State in January, 1801, when appointed Chief Justice and took his seat on the bench. Yet he held both offices up to the night of March 3, 1801, when his office as Secretary of State expired. It was he who, at midnight, signed the commission to *Marbury*, which he left on the table because unable to deliver it before the clock struck 12, for *Levi Lincoln*, the new Attorney General stood by him (as *Parton* says) with

Mr. Jefferson's watch in hand and forbade him to proceed. It was this commission which he sought to validate as Chief Justice when a mandamus was asked to compel Madison, the new Secretary of State, to deliver it. He did not issue the mandamus. If he had, there might have been impeachment proceedings which would have nipped this doctrine in the bud, as was done in England by the execution of Chief Justice Tressilian and the exile of his associates.

I would not have anyone in this audience misunderstand me. I am not arguing that the Supreme Court of the United States, or any other judges, were not able and incorruptible because they have differed with me in this matter. Nor does the fact that Thomas Jefferson, Andrew Jackson, Abraham Lincoln, William J. Bryan, Theodore Roosevelt, and thousands of others have denied the existence of this power in the judiciary put the judges in the wrong. But the fact that judges are able and conscientious does not confer such power when it can not be found in the Constitution.

Men of ability are not free from errors, nor from being influenced by love of power. However conscientious they may be, placing them on the bench does not change their nature nor the views which while at the bar they have entertained of the sacredness and superiority of vested property rights over human rights.

It is true that the audience before me, however respectable, is not the people of the United States. At Syracuse there was a large prison in which every utterance, however low, could be heard by the custodian of the King. It was known as the "Ear of Dionysius." New York is the great and throbbing center of this country—its "Ear of Dionysius." What is said here, and on an occasion like this, if it deserves any consideration, will be heard and considered all over this country. To you, therefore, I have submitted these views for your judgment, as the representatives of the people who are and ought to be the supreme power in the Republic.

Even Mr. Taft, who was long a judge and who is on record in favor of judicial high prerogative, has said:

If the law is but the essence of common sense, the protest of many average men may evidence the defect in a legal conclusion, though based on the nicest legal reasoning and profoundest learning.

Mr. Herbert Croly says:

Every popular government should, in the end, and after a necessarily prolonged deliberation, possess the power of taking any action which in the opinion of the decisive majority of the people is demanded by the public welfare.

Many judges have concurred in and written opinions holding statutes unconstitutional, because, though this power was never conferred, it has been supported by long acquiescence; and legislatures have passed many statutes, which otherwise would not have been enacted, by salving their consciences with the statement, "If the act is unconstitutional, the courts will set it aside." I am not attacking the judges for doing what most, if not all, of them have done. But I support the proposition that such authority has never been conferred by the Federal or any State constitution; that its exercise is dangerous, and especially so as to the judges themselves, and that it rests solely upon long acquiescence and not on any authority in the Constitution. We have seen lately a formidable movement for the recall of the judges and a recall of judicial decisions, and a growing antagonism on the part of the masses, who are coming to view the courts with

distrust and as being hostile to all progressive movements for the betterment of their condition.

We can not claim that we are necessarily governed by the people because of our form of government, nor that our officials are really chosen by the people or are responsive to their will. After the Revolution, as I have said, the suffrage was very much restricted. Manhood suffrage was practically unknown. Without going into the details in the different States, I may cite the constitution in North Carolina. In that State, down to 1855, no man could vote for a State senator unless he owned 50 acres of land. Men who owned less, or no land, were not deemed possessed of sufficient intelligence or patriotism to exercise that right. Down to 1836, our governor and all State officials were chosen by the legislature. And the judges were chosen in the same mode, and for life, down to 1868. For 60 years our sheriffs, clerks of the court, coroners, and other officials were appointive or elected by the magistrates, or legislature. Changes in this respect to popular vote took place in other States, some earlier and some later than with us. While the change has broadened the influence of public opinion, we have not yet reached the point where the control of any State government or of the Federal Government is really in the people.

In the last analysis, our Government is very largely a plutocracy. Our nominations are made largely by party machines, which more or less in different localities are supplied with the bulk of their funds by great interests, which are thus enabled to dictate in a large degree nominations by each of the political parties, leaving the people to take their choice between candidates of like sentiments as regards the interests. This is being more generally understood, and hence the widespread agitation in favor of the initiative and the referendum, and of legalized primaries, and of other measures intended to place the real power in the hands of the people. Only experience can decide how far the politicians can "beat" these measures, and how far they can be made effective by remedying the defects which shall be found in them after trial. In many States the machines have, so far, prevented the people from even testing the efficacy of these measures. In others, the measures are on the statute book, but time alone can demonstrate, as already said, how far they can really place the Government of this country in the hands of the people.

In reference to "Government by Judges" who hold the ultimate power in this country, since there is no power to review or annul their action when they set aside legislation, I will call attention to the measures which have been proposed for curing this evil:

(1) One of the remedies proposed, as to the United States judges, is to change the undemocratic life tenure into tenure for a term of years and to make them elective by the people; that is, that the district judges shall be elected by the people of their respective districts, and the circuit judges by the people of their circuits, as in most of the States, and that the country shall be divided into 9 divisions, for each of which a judge of the United States Supreme Court shall be chosen by the people thereof, and that the judges shall, from their number, elect the Chief Justice. Such an amendment has been repeatedly offered in Congress, but the powerful influences in favor of the present system have so far prevented its adoption, as for 90 years they prevented the passage of the amendment to make the

Senators elective. As this change has been made in nearly every one of the States, there can be no question that it meets popular approval and that it should be adopted. It is, so to speak, a modified recall, in that it submits a judge's conduct to popular approval at stated intervals. It will not, however, cure the entire trouble. The judges of most of the States have been made elective and for a term of years. This has proved beneficial (for the continuance of the former system had become unbearable), but will not cure the evil entirely as long as the judges retain their assumed power of an irreviewable veto upon legislation.

(2) Another remedy proposed, and which has been supported by Mr. Bryan and other trusted leaders, has been the "recall of the judges." This has been adopted in California, where for 40 years the railroads and other interests practically dictated the nomination and election of the majority of the judges, and dictated many decisions. So intolerable was the condition in that State that when an amendment to this effect was submitted to the people it was adopted by more than 100,000 majority. The same provision has been adopted into the constitutions of Oregon, Arizona, Nevada, and Colorado, and has been submitted to the people for ratification in Kansas and Minnesota. In Arkansas it was adopted by the people, but the court set it aside on a technicality. When Mr. Taft refused to approve the bill admitting Arizona as a State because it contained this provision, the people of that State wisely submitted to his arbitrary conduct; but immediately upon becoming a State submitted and passed an amendment reinserting that provision.

The recall of judges is by no means a new feature, except in the fact that it is to be made by the people. In England they have had this recall ever since 1688, for though the judges are nominally appointed for life, they hold subject to a provision that they can be removed at will and without cause by a majority vote in Parliament.

We will come a little nearer home. In Massachusetts they have always had exactly the same provision in their constitution. When in 1820 there was a convention to revise their constitution, Daniel Webster and others who represented, as he did, vested interests, earnestly pleaded to strike out this provision, arguing that it would make the judges subservient to any passing gust of the popular will. But Massachusetts had a better opinion of her people and of her judges. The convention refused to strike out the provision, which is still in their constitution. In England and in Massachusetts and other States which have such a provision, it has not been often, if ever, used; but, in the language of Mr. Wilson, it has been, it seems, a good "gun behind the door."

The recall of the judges is unnecessary where they hold for a term of years, and not for life, provided they are really nominated and elected by the people. The recall as applied to the judges is objectionable, in my judgment, for many reasons, and among them this, that it can be applied to cases of ordinary litigation where the judge is exercising only his legitimate judicial function. If as to such matters he proves corrupt, he can be impeached; and if he proves feeble, he can be dropped at the end of his term. The other proposed remedies, which are set out below, have the great advantage that they apply to prohibit, or to review, the courts only when they attempt to exercise legislative functions by setting aside acts of the

legislature or Congress without any constitutional authority in themselves to do so.

(3) There is the remedy which has been ably advocated by Mr. Roosevelt, which is commonly called by its opponents the "recall of judicial decisions." In substance, however, it simply applies to the decisions of the courts on constitutionality of statutes the same remedy that the Constitution now gives as to the veto of the President, to wit, that the statute which has received a judicial veto shall be submitted to Congress, or the legislature, as may be, and if the court's veto is overruled by the same vote that is required to overrule an executive veto, the statute shall be held in force. There can logically be no objection to applying to the judicial veto that has been assumed without express authority the method that is given to review the expressly conferred executive veto.

(4) Another remedy, still, is a suggested amendment that the courts shall not be permitted to hold any statute unconstitutional. Seeing that in every legislature and every Congress the members are sworn to obey the Constitution equally with the judges, and that in those bodies there is always a large number of lawyers, and other men of equal ability to the judges, there is no reason that we should not conform our procedure in this matter to that of England and all other countries which have always denied to the judges any control over legislation, and which have always refused the courts the overwhelming power of an irreviewable veto upon legislation which our judges have assumed. In Ohio their recent constitution has modified this suggestion by providing that the courts shall hold no statute unconstitutional if more than one judge dissents.

This would seem logical, even if the judges rightfully possessed the veto power, because the United States Supreme Court has always held that no statute should be declared unconstitutional unless it was so "beyond all reasonable doubt." *Ogden v. Saunders*, 12 Wheat., 269. In practice, however, we may observe that the court held the income tax unconstitutional when all previous courts, and indeed the same court in that very case, had held that statute constitutional, and the opinion in favor of its unconstitutionality was by a vote of 5 to 4. Upon this showing, certainly, its unconstitutionality was not "clear beyond a reasonable doubt." But men possessed of irreviewable, irresponsible powers are capable of strange reasoning and strange conduct, and judges are no exception.

(5) But irrespective of the slow process of constitutional amendment, which the interests will fight in every State legislature, there is a remedy at hand and already in the power of Congress, if they choose to exert it.

As to judges below the Supreme Court, they are created not by the Constitution, but by an act of Congress. Congress can, therefore, abolish any district or circuit at will. It has abolished several districts, and in 1802 it abolished sixteen circuit judges at a blow. It is, therefore, in the power of Congress to exercise the same power that is possessed by Parliament in England and by the legislature under the constitution of Massachusetts and some other States, of dropping the judges by a majority vote, with the approval of the President.

Nor is Congress without power as to the Supreme Court, for the Constitution provides that, except as to the few cases in which the

Supreme Court has original jurisdiction, it shall have appellate jurisdiction "with such exceptions and under such regulations as Congress shall make." It is, therefore, entirely within the power of Congress to deprive the courts of assuming jurisdiction to hold any statute unconstitutional. Such an act was held constitutional by the court itself in the *McCardle* case (7 Wall.), in which Congress deprived the court of jurisdiction of an appeal by an act passed even after the appeal was taken and the court held that they were disabled to proceed. Indeed, the court recognized this power in *Marbury v. Madison*, the very case in which the extraordinary doctrine of the judicial veto was first put forward, for after declaring the statute unconstitutional, the court wound up by holding that it could not put its opinion into effect, because Congress had not authorized them to issue any writ to execute their judgment by a mandamus, which would have been necessary in that case.

I have thus addressed you, my fellow citizens, on great questions which deserve your consideration in view of a determination on the part of a large portion of our fellow citizens to have a fairer share in the opportunities of life. The progressive and humanitarian measures necessary to the betterment of their condition are almost invariably negatived by the courts, whose sympathies are usually with the propertied class and vested rights. So far, you have had to meet this by the slow process of constitutional amendments, as in the *Ives* case in your own State and other instances, and the same has been true in other States. I have cited the amendments to the Federal Constitution, one of which, as to the income tax, has after 20 years of wrong, cured one of the worst decisions ever rendered by our highest court. I could not, however, condemn it more strongly than was done in the opinions of the four dissenting judges in that case and as it should be condemned by any impartial man.

All the rest of the world "live, move, and have their being" without the irreviewable control and supervision of judges over the other departments of the Government. The adherents of "big business" and of the special interests assert that we have always had it here (since 1803), and that we will go to ruin if we dispense with it. Of course we shall, unless our people are capable of self-government—as we asserted in 1776.

"If there is anything which may be said to be axiomatic in American constitutional law, it is the proposition that neither of the three departments of Government can rightfully interfere with the workings of either of the others. It is to be profoundly regretted that this salutary principle was first violated by the judicial department in *Marbury v. Madison*." This is a remark of the late Judge Seymour D. Thompson in an admirable address before the Bar Association of Texas in 1896 (30 Am. Law Rev., 678). After referring to many cases in which the court had exercised authority beyond their rightful powers, he thus sums up, in language which I reproduce for its intrinsic power. Judge Thompson said:

There is danger, real danger, that the people will see at one sweeping glance that all the powers of their governments, Federal and State, lie at the feet of us lawyers—that is to say, at the feet of a judicial oligarchy; that those powers are being steadily exercised in behalf of the wealthy and powerful classes and to the prejudice of the scattered and segregated people; that the power thus seized includes the power of amending the Constitution; the power of superintending the action, not merely of Congress, but also of the State legislatures; the power of degrading the powers of the

two houses of Congress, in making those investigations which they may deem necessary to wise legislation, to the powers which an English court has ascribed to British colonial legislatures; the power of superintending the judiciary of the States, of annulling their judgments and of commanding them what judgments to render; the power of denying to Congress the power to raise revenue by a method employed by all governments; making the fundamental sovereign powers of government, such as the power of taxation, the subject of mere barter between corrupt legislatures and private adventurers; holding that a venal legislature temporarily invested with power may corruptly bargain away those essential attributes of sovereignty, and for all time; that corporate franchises bought from corrupt legislatures are sanctified and placed forever beyond recall by the people; that great trusts and combinations may place their yoke upon the necks of people of the United States, who must groan forever under their weight, without remedy and without hope; that trial by jury and the ordinary criminal justice of the States which ought to be kept near the people are to be set aside and Federal court injunctions substituted therefor; that those injunctions extend to preventing laboring men from quitting their employment, although they are liable to be discharged by their employers at any hour, thus creating and perpetuating a state of slavery. There is danger that the people will see these things all at once; see their enrobed judges doing their thinking on the side of the rich and powerful; see them look with solemn cynicism upon the sufferings of the masses nor heed the earthquake when it begins to rock beneath their feet; see them present a spectacle not unlike that of Nero fiddling while Rome burns. There is danger that the people will see all this at one sudden glance, and that the furies will then break loose, and that all hell will ride on their wings.

These were the words of a very wise and just judge. There are those who will heed them and there are those who will mock at them. To my brother judges who may hear them to-night, or who may read them, I would cite the instance of the 10 virgins of whom Supreme Wisdom said: "And five of them were wise and five of them were—not."

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